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Anonymity and the Supreme Court's Model of Expression: How Should Anonymity be Analysed Under Section 2(b) of the Charter?

by Peter Carmichael Keen[†]

Introduction

Anonymity can be vital to free expression. History is replete with examples of individuals who expressed their viewpoints and faced ridicule, threats, torture or death as a result. Early Christians, and many religious groups since, had to practice their beliefs in secret, as they faced persecution for publicly expressing their views. People are likely to remain silent if they will be harmed for speaking out. Anonymity encourages free expression because it allows ideas to be publicly disseminated while shielding the speaker from the reactions of those threatened by the ideas.

To date, only one Canadian decision has analysed whether anonymity is constitutionally protected by the right to free expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the Charter). In a perfunctory analysis of only a few paragraphs, the Alberta Court of Queen's Bench, in *Harper v. Canada*,¹ decided that the ability to make anonymous political donations was not protected under section 2(b). This ruling was explicitly limited to the circumstances of that case and the Court did not engage in an extensive analysis of anonymous expression. Despite the lack of decisions to date, there is a growing interest in anonymity, which suggests that more constitutional claims will be made. A debate is currently raging about whether anonymous expression on the Internet should be protected. On one side of the debate sit individual Internet users, who feel safe in anonymously posting criticism on Internet billboards about companies or individuals they dislike. On the other side sit individuals and corporations who have been defamed by such criticism, and who seek limitations on anonymity because they want to be able to sue the tortfeasor.² Often, Internet Service Providers (ISPs), which provide Internet access to individual users, are the only organisations that know who the users are. Courts in both Canada and the United States have ordered ISPs to disclose the names and addresses of users who have engaged in alleged defamation.³ Individual interest in

anonymity has been demonstrated in a number of court cases, in the context of adoption, where biological parents may wish to remain anonymous,⁴ by witnesses who wish to remain anonymous,⁵ and by parties to cases involving abortion.⁶

The existence of laws that will have an impact on anonymity is another reason to believe that claims will be made that anonymity is constitutionally protected. One example is the section 163.1 *Criminal Code* prohibition on possession and distribution of child pornography. Courts have already dealt with child pornography prosecutions where the offending material has been distributed over the Internet.⁷ The federal government is currently trying to decide whether it should introduce laws that would allow law enforcement agencies to compel an ISP to disclose a user's identity.⁸ If an ISP was ordered to disclose such information, and this led to the prosecution of the user, the defendant could claim at trial that the disclosure violated a right to anonymity. In addition, governments have deliberately limited anonymity in other ways. Those lobbying the federal government are required to register themselves, and to disclose who they are lobbying and why, under the *Lobbyists Registration Act*.⁹ Breaches of the Act can be punished by up to two years in prison, and by fines of up to \$25,000.¹⁰ When such a breach is prosecuted, the accused could defend the case by arguing that the limitation on anonymity is unconstitutional. Finally, federal legislation currently allows an ISP to disclose personal information about its users to the government.¹¹ If an Internet user wanted to remain anonymous from the government because he or she was criticising the government, and such information was disclosed, the user might argue that this violated a right to anonymity. Issues like the debate over anonymous expression on the Internet, the prosecution of Internet related offences, and legislative limitations on anonymity, means it is necessary to study whether anonymity is constitutionally protected under section 2(b) of the Charter.

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The first part of this article will discuss what anonymity is, and the costs and benefits that anonymity confers on expressive activity. I will demonstrate that anonymity is a double-edged sword in that it can both promote and harm free expression. In the second part, I will suggest that there is no doubt that anonymity can be protected under section 2(b) of the Charter. When I first began this article, I intended to examine “whether” anonymity can be constitutionally protected under section 2(b). As my research progressed, I quickly realised that I was asking the wrong question. I discovered that section 2(b) has been interpreted so broadly by the Supreme Court of Canada that there is no doubt that anonymity can be protected in some circumstances. However, since anonymity can harm free expression, and since Charter analysis is contextual, a more interesting and difficult question is how the courts will analyse anonymity in a particular factual circumstance. What conceptual framework is necessary for a reasoned analysis of anonymity to take place?

In the third part of the article, I will consider the case law under section 2(b) of the Charter. The objective will be to determine whether the current approach taken by the courts to section 2(b) can accommodate an analysis of anonymity. The model of expression that has developed in the Supreme Court of Canada’s jurisprudence (the jurisprudential model) will be discussed, and will be compared with a basic model of communication, which is taken from elementary communication theory (the communication model). This study will reveal that the jurisprudential model has developed beyond the view in *Irwin Toy v. Quebec* that expression is made up of form and content. It will also reveal that the jurisprudential model resembles an impoverished version of the communication model. The comparison will demonstrate that the jurisprudential model is inadequate, and is unable to accommodate a proper analysis of anonymity. I will conclude by suggesting that the approach to freedom of expression must be developed if anonymity is to be properly analysed under section 2(b), and will describe how this development should occur.

What is Anonymity?

Before we can consider when anonymity may be protected under section 2(b) of the Charter, we first need to understand what “anonymity” means, and why anonymity is important.

Anonymity refers to identity knowledge. A person is anonymous when he or she is “not named or identified”: when his or her identity is not known.¹² Having said this, “identity” is not synonymous with “legal name.” Gary Marx identifies seven forms of identity knowledge:

(1) legal name, (2) locatability, (3) pseudonyms that can be linked to legal name and/or locatability — literally a form of pseudo-anonymity, (4) pseudonyms that cannot be linked to other forms of identity knowledge — the equivalent of

“real” anonymity (except that the name chosen may hint at some aspects of “real” identity knowledge), (5) pattern knowledge, (6) social categorization, and (7) symbols of eligibility/noneligibility.¹³

Helen Nissenbaum points out that “the value of anonymity lies not in the capacity to be unnamed, but in the possibility of acting or participating in society while remaining out of reach, remaining unreachable.”¹⁴ Where others do not know your identity, you are not reachable. With this in mind, the importance of the forms of identity knowledge becomes clear. Legal name, when combined with locatability, means that a person is known to others and is easily reachable.

When an individual interacts with society pseudonymously, the individual is identified by the pseudonym. An example of pseudonymous interaction occurs in Internet chat rooms, where individuals identify themselves by email addresses or other pseudonyms while “chatting.” To the extent that the pseudonym can be linked to the individual’s legal name and location, he or she is reachable. Depending on the extent of pseudonymity, a pseudonymous person can be faceless, sexless and ageless, with no identifiable race; a being capable of interacting with society without society knowing who it is interacting with.

Pattern knowledge makes a person reachable to the extent that the person can be located through the pattern. As Marx puts it, in “everyday occurrences (say, riding the subway each day at 8 a.m.), we may come to ‘know’ other riders in the sense of recognising them.”¹⁵ Social categorization identifies individuals through their membership in some group (for example, VISA credit card holders). Anonymity is limited to the extent that others do not know who the members of the group are. If, for example, the police do not know the legal identity of a suspect, but know that the suspect holds a General Motors (GM) VISA card, the police could obtain a list of GM card holders, and use this as a starting point to track down the suspect. Symbols of eligibility or non-eligibility, such as passwords to log-on to a computer network, allow persons to be identified with respect to particular activities. Those who are entitled to log-on are distinguished from those who are not. Only when no forms of identity knowledge exist with respect to an individual can that individual be said to be perfectly anonymous.

Anonymity exists in various degrees. Marx’s forms of identity knowledge demonstrate that anonymity exists in varying degrees. A person’s anonymity decreases as the number of forms of identity knowledge increase. Certain forms of anonymity are perfect, or nearly perfect, in the sense that the anonymous individual’s identity can never be discovered by others. A letter to the editor is a good example: if you send an unsigned letter to the editor via Canada Post through the physical mail with no return address, it will be impossible (or nearly impossible) for the editor or anyone else to discover your identity.

Many forms of anonymity are imperfect. Individuals, who will be referred to here as “users”, access the Internet through Internet Service Providers (ISPs). Often, these users adopt a pseudonym, and log on to the Internet and interact with others under this pseudonym.¹⁶ Each user’s computer has a unique Internet protocol (IP) address, which is the electronic equivalent of a physical mailing address. Whenever a user interacts online with another user, their computers must exchange IP addresses. This allows each computer to send data to the other computer. Without knowing each others’ IP addresses, the two computers could not communicate. If a user posts something on an Internet billboard under a pseudonym, the user’s IP address can be recorded by the billboard host, and the IP address can be retrieved. The IP address can be traced to the user’s ISP. The ISP will usually have the information linking the IP address to the user’s legal identity and physical address. If a court orders the ISP to disclose the information,¹⁷ the user’s anonymity will be eliminated. While there are methods of protecting anonymity, by using technologies such as anonymous remailers, this technology is imperfect and can be broken.¹⁸ As a result, it has been argued that all anonymity on the Internet is a myth.¹⁹ What this means is that while a user maintains some degree of anonymity by using a pseudonym, the user is anonymous only to the extent that the ISP cannot be forced to disclose the user’s identity.

A corollary of anonymity existing in degrees is that anonymity can be regulated in degrees. Regulators, when deciding whether anonymity should be limited, are not faced with a choice between completely eliminating, or absolutely protecting anonymity. There is an ongoing debate about whether governments should legislate to protect Internet users from SLAPP suits. A SLAPP suit is “Strategic Litigation Against Public Participation”, a law suit brought by a corporation that is intended to “intimidate its critics into silence.”²⁰ The Internet has been described as a “democratising” tool that gives the disenfranchised a voice because the Internet is a cheap and efficient method of expressing ideas to the world.²¹ It allows individuals to criticise powerful entities such as corporations. Individuals can post criticism on Internet billboards at virtually no expense. SLAPP suits are likely to silence such critics because individual Internet users will not have the time or resources to fight such a suit, regardless of its merits. Unfortunately, the Internet also allows individuals to engage in irresponsible speech and deliberate defamation. In *HealthSouth Corp. v. John Doe*, which later became *HealthSouth Corp v. Krum*, a disgruntled ex-employee of *HealthSouth Corp* posted false information that the CEO of *HealthSouth* had committed fraud. The employee also falsely stated that he was having an affair with the CEO’s wife.²² Internet anonymity is a barrier to defamation and SLAPP suits because users can only be sued if the corporation bringing the suit can discover the alleged defamer’s identity.

In deciding whether and how to legislate with respect to anonymity and SLAPP suits, governments must balance interests in free expression against the rights of corporations not to be defamed. Legislation could be introduced that dictates when legal identity can be disclosed by an ISP. The legislation could make it difficult for ISPs to disclose a user’s legal identity, which would protect anonymity.²³ The legislation could also make it easy for ISPs to disclose legal identity, in which case anonymity would be limited. The extent of the protection or limitation on anonymity would depend on the way the regulation was drafted, which shows that anonymity can be regulated in degrees.

*Anonymity only exists as an aspect of an underlying interaction.*²⁴ Anonymity does not exist in the abstract. Since the extent of anonymity is a function of identity knowledge, anonymity between two beings can only exist when there is some direct or indirect interaction between those two beings. Anonymity requires, at a minimum, one being’s awareness of the anonymous being’s existence, which requires an interaction. If you have never heard of a writer, or have had no interaction with a writer, either directly (by reading one of the writer’s works), or indirectly (by hearing about the writer from some other source), it would be incorrect to describe the writer as anonymous. Rather, he or she is unknown to you. Only after some interaction takes place between yourself and the writer, perhaps by your reading a review about one of the writer’s books, can the writer be said to be known to you. Anonymity will exist when you are aware of the writer’s existence, but do not know any of the forms of identity knowledge that could be used to identify the writer. The most common interaction involving anonymity is communication, which requires expression.

The importance of anonymity varies with the underlying expression. A person may decide to post comments on an Internet billboard anonymously because he or she fears retaliation about those comments. In such circumstances, anonymity is vital to the expressive activity. When a person drives into a full-serve gas station, asks for a fill-up, and pays using cash, the transaction is anonymous to a degree, because the driver’s legal identity is not known to the gas-station attendant. The driver probably does not care one way or another whether the attendant knows the driver’s legal identity, so anonymity has no impact on this transaction.

Both the expresser and the receiver of a communication can be anonymous. The person who picks up a book in the library can read anonymously unless he or she takes the book out. The Supreme Court of Canada has held that both expression and reception of information is protected by freedom of expression.²⁵ As such, in any constitutional debate that considers anonymity, we must be concerned both with expressers’ and receivers’ rights to anonymity.

Anonymity may be a group or an individual characteristic. In mass media communications, the audience's anonymity is a group characteristic.²⁶ The expresser may also be an anonymous group. When documentaries are produced, hundreds of people may be involved in the production. The message conveyed by the narrator may be the product of the producer's mind, the director's mind, the writer's mind, or the TV station owner's mind. The author of the message is unknown to the audience, though the medium through which the message is expressed (the announcer) is visible. The message may also be the product of a collaborative effort, in which case the group is represented by the announcer, in a form of pseudonymous anonymity. Constitutional protection for anonymity may protect both group and individual interests.

In communication, anonymity may be purposefully relied upon, or it may arise necessarily. In some circumstances, anonymity will only exist if one party to a communication deliberately chooses to withhold his or her identity, such as an Internet user placing a message on a billboard, but choosing not to affix his or her name. In other circumstances, anonymity must exist by the very nature of the communication. The audience in mass media communications is invariably anonymous. As an example, the Webmasters of high-volume Web sites will rarely know the identities of all those browsing their Web sites because of the large number of visits. The government could attempt to eliminate anonymity where it arises necessarily in mass-media Internet communications, perhaps by requiring Web sites to record all visits and disclose this information to the government. Such an elimination could result in an Orwellian situation, where every person's move in cyberspace is recorded, and later reported to the state. Society's liberty interests may demand that anonymity in mass communications be protected.

Anonymity may be integral to a communication, becoming part of the message being communicated, or it may be distinguishable from, and tenuously linked to, the message. When an infamous person decides to publish a political work representing a despised minority's view, and does so anonymously, the anonymity is a vital part of that work. In hiding the writer, readers are less likely to be influenced by biases they would normally feel about that person. This influences the interpretation of the work. The fact that it is published anonymously may also be a subliminal message to the reader about the work: "This work is so important and dangerous to those in power that I, the writer, can not attach my name to it." Where this occurs, anonymity becomes part of the content of the message. Anonymity may also be tenuously linked to the communication. When the driver at the gas station asks for gas, the transaction is the same, whether the attendant is dealing with a "Sarah", or a "Denise."

We now have an understanding of what anonymity is, but have not fully explored why it may be important

to expression. To do this, we should examine the costs and benefits that anonymity confers on expression, before going on to conduct an analysis under section 2(b) of the Charter.

Costs and Benefits of Anonymity

Many constitutional rights carry costs as well as benefits. The accused's right to a fair trial, for example, can be used to invade the privacy and equality rights of victims. Individuals accused of sexual assault frequently sought disclosure of the complainant's therapy records in order to gain information that could be used to challenge the credibility of the victim.²⁷ Complainants felt that their privacy was being invaded by this, and that they were being treated differently from other victims.²⁸ Rules which benefited the accused's section 11(d) Charter right to a fair trial were costs to the complainants' Charter-protected privacy and equality rights. The costs of the section 11(d) right harmed *different* Charter rights. The courts have held, in such cases, that the balancing of interests should occur under section 1 of the Charter, rather than at the stage of considering the right itself.²⁹ Anonymity is different, not because it has costs, but because some of the costs and benefits of anonymity are related to the *same* Charter right: freedom of expression. It is important to remember that freedom of expression protects "listeners as well as speakers",³⁰ and as we will see, cases may arise where anonymity is a benefit to the speaker, but is a cost to the listener, and *vice versa*.

Anonymity can both encourage and discourage expression. Anonymous communication allows dissenting or unpopular opinions to be presented in circumstances where, if the speaker was known, he or she would suffer embarrassment, oppression, arrest, torture or even death. People who would not express themselves if their identities were published may be willing to speak anonymously.³¹ By hiding identity, anonymity allows individuals to place themselves beyond the reach of a coercive state or other oppressive forces.³² Where it is dangerous or unpopular to express particular viewpoints, anonymity encourages such expression. "Thomas Paine's Common Sense, acclaimed as the work which sparked Americans to think about separating from Britain, was first published signed simply 'An Englishman'."³³ If the English government knew who the author was, Paine might have faced reprisals. Minorities particularly benefit from anonymity. In 1958, the Alabama state government tried to force the NAACP to reveal the names of its members. The racist overtones of that situation were a serious threat to the group's continued existence. In the context of Ku Klux Klan bombings and other racially motivated attacks, revealing the members of the association could have placed their lives at risk; hardly a conducive atmosphere to freedom of association and expression. Fortunately, the U.S. Supreme Court upheld the

NAACP's refusal to release the names, which protected the members' anonymity.³⁴ If anonymity is limited, such groups may be less willing to speak out.

Unfortunately, anonymity can also be used to discourage expression. Although hate-speech is prohibited by law,³⁵ the law can be evaded by engaging in anonymous hate-speech. This hate-speech may discourage members of the targeted group from expressing themselves.³⁶ Accordingly, it is inaccurate to assume that anonymity always benefits free expression, and we must recognise that the effect anonymity has on expression will vary in each case.

While anonymity can encourage expression, anonymity lowers the quality of expression. Anonymity eliminates accountability and encourages irresponsible expression.³⁷ While there is a massive amount of anonymous communication on the Internet, much of it has little value, being no better than mindless gossip or innuendo.³⁸ Those criticising others are more likely to do so responsibly if they have to identify themselves, because their speech may have consequences.³⁹

Anonymity can both facilitate detection of crime, and make it easier to evade detection. Witnesses to crimes will be more willing to come forward when they can do so anonymously, which is why "Crime Stoppers" is anonymous. Whistleblowers are more likely to expose their employer's negligence or illegality, if they can do so without destroying their careers.⁴⁰ Unfortunately, anonymity also facilitates crime and other harmful behaviors. Online harassment has been identified as a growing problem.⁴¹ If an Internet user wishes to harass or make threats to another user, the harasser can use anonymity to avoid detection and prosecution.

Anonymity both improves and inhibits understanding. The understanding of any communication is influenced by the perceptions of those receiving it.⁴² By shielding the identity of a writer, anonymity prevents a reader's pre-conceived notions about the author from altering the reader's reaction to a message. This is particularly useful for those who would be ignored if their identity was known. Currer, Ellis and Acton Bell are prime examples.⁴³ If the Brontës' identities as women had been known, their novels might never have been published.

However, freedom of expression protects both speakers and listeners, and anonymity can hamper a reader's ability to read critically. Our knowledge and experience of a writer allows us to assess the writer's reliability and worth, so it is more difficult to trust anonymous writers.⁴⁴ In assessing information leaked from the government by an "unnamed source", the public would be better able to assess the value of the information if they knew whether it came from the prime minister's mouth or a disgruntled backbencher who had just been demoted from cabinet.

Anonymity encourages private communications, but also makes them easier to abuse. Where an indi-

vidual wishes to seek help for a personal problem, privacy can be vital. If the individual is embarrassed about the problem, he or she is unlikely to seek help if the problem will become public knowledge. Privacy is an important human need, and intimate personal communications are vital for human health.⁴⁵ Anonymity is used to encourage individuals to engage in therapy, or to receive medical attention.⁴⁶ As an example, governments keep records of those suffering from communicable diseases, such as AIDS. In an effort to prevent the spread of AIDS, governments released the medical status of AIDS sufferers to their family, friends, employers, and past sexual partners. Fear of this occurring has discouraged people from taking AIDS tests, which, ironically, contributed to the spread of the disease. As a result, anonymous AIDS tests are now widely available, and are frequently used. Anonymity can be used to encourage private communications by bolstering confidentiality.

While anonymity can be used to protect an individual by ensuring their privacy, anonymity allows others to engage in attacks by disguising their identity. In the "Strange Case of the Electronic Lover", a male psychologist frequented an Internet chat-room, pretending to be female. This pretence was a form of pseudonymous anonymity. He used this to get female Internet users to open up to him, and to discuss their problems. While this psychologist was apparently able to help some of the women, some of his victims felt betrayed when they discovered his gender.⁴⁷ This suggests that while anonymity may encourage private communications, it may also facilitate abuse. Fear of such abuse may discourage therapeutic relationships.

We can see from this analysis that anonymity is a double-edged sword. While anonymity may encourage expression and communication, it can also have the opposite effect. It may be correct to say that anonymity will often promote expression, but it does not follow that anonymity will always promote expression. Now that we have examined the costs, benefits, and nature of anonymity, we should consider whether anonymity can be protected under section 2(b) of the Charter.

Can Anonymity be Protected Under Section 2(b)?

Anonymity can be protected under section 2(b) of the Charter. Historically, anonymity has been integral to the exercise of free expression, having been used time and time again by people speaking out against repressive regimes.⁴⁸ Section 2(b) protects all expression, no matter how repulsive, including hate speech, solicitation for the purposes of prostitution, and pornography.⁴⁹ Much of this expression lies far from the core values underlying section 2(b). Since anonymity has been used to allow political expression, which lies at the very center of these values, it seems intuitive that anonymity can fall within the scope of section 2(b). A simple example con-

firms this. Imagine that the Canadian government enacts legislation stating that no criticism of the governing political party can be published unless the author of the criticism is identified, but that criticism of opposition parties can be anonymous. In such a situation, the purpose of the legislation is to stifle criticism of the governing party, and to encourage criticism of the opposition. The underlying activity, political criticism, is expressive, and the purpose of the legislation is to limit free expression. It is difficult to imagine a court refusing to find that the legislation was an unconstitutional limitation on free expression.

In my view, there is no doubt that anonymity *can* be protected under section 2(b), so I will not discuss this issue further here.⁵⁰ However, this does not help us decide the more difficult question of whether anonymity *should* be protected in a particular case. Constitutional analysis requires a contextual approach,⁵¹ and courts do not deal with Charter rights in the abstract. A claim of constitutional protection for anonymity may arise in any number of situations: commercial Internet transactions can occur anonymously;⁵² individuals may post anonymous insults on an Internet billboard; a murderer may select victims through online interactions, using anonymity to conceal his or her identity; a person may write anonymous political leaflets. In each of these scenarios, the interests at stake are different. It follows that the need to protect anonymity will vary, depending on the circumstances of each case.

The remaining sections of this paper will address the question of when anonymity *should* be protected under section 2(b) of the Charter. The focus will be entirely on how the courts should decide whether a particular use of anonymity falls within the scope of section 2(b) of the Charter, and whether a limitation on anonymity violates section 2(b). I will not examine the framework of analysis under section 1 of the Charter because this analysis is highly contextual, depending heavily on the facts of each case.⁵³ I am attempting to suggest a general approach that could be used to analyse anonymity under section 2(b). This is necessarily an abstract question, making a consideration of section 1 difficult.

The Supreme Court's Model of Expression

Freedom of expression has been constitutionally enshrined in section 2(b) of the Charter, which protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".⁵⁴ The objective of this article is to determine how anonymity should be analysed under section 2(b). To do this, it is first necessary to examine the model of expression that has developed and grown through the Supreme Court's post-Charter freedom of expression jurisprudence. In this model, expression is

made up of components and actors, which are considered within an analytical framework.

The first components of expression recognised by the Supreme Court of Canada can be found in *Ford v. Quebec*.⁵⁵ The court held that language "is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice."⁵⁶ In *Irwin Toy v. Quebec*,⁵⁷ Dickson C.J. stated that expression "has both a content and a form, and the two can be inextricably connected."⁵⁸ Content is the message to be conveyed.⁵⁹ Form was not defined, but Dickson C.J. stated there are an "infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts."⁶⁰ It seems that form refers to the physical manner in which a message is conveyed. Thus, the Supreme Court's earliest jurisprudence suggested that expression was made up of two components, form and content, which were inextricably linked. This has cast a shadow over much of the jurisprudence and academic writing since, with many jurists thinking of expression as if it were made up only of form and content. As we will see, the Supreme Court has moved beyond this primitive model.

Three more components have now been recognised: time, medium and forum. The time at which expressive activity occurs is identified in both Canadian and U.S. jurisprudence, and is susceptible to regulation,⁶¹ but there is no specific "test" in Canada that the courts can apply to deal with limitations on "time." This is not surprising, as the courts have not needed to grapple with a case concerning limitations on the times at which expressive activity can occur.

If the form is the physical means through which expression occurs, the medium is the method through which the message is conveyed.⁶² A written document may be conveyed through the medium of a magazine, printed in a book, sent by an email, or posted on a Web site. While the Supreme Court of Canada has identified "medium" as an aspect of communication,⁶³ no analytical framework has been developed to determine when limitations on a medium are constitutionally permissible. It is unclear, for example, how the courts will analyse state limitations on Internet use, such as the federal government's recent proposals that, if adopted, would require Internet service providers to "develop or deploy systems providing interception capability"; essentially, to allow wiretaps of email accounts.⁶⁴ As with "time", this is probably because the court has not yet been faced with arguments over a limitation on the use of a medium.⁶⁵

Forum has been identified as an aspect of expression in academic literature,⁶⁶ and has been the subject of three Supreme Court of Canada decisions. These cases will be discussed in some detail below, as they have contributed significantly to the development of the analytical framework within which section 2(b) claims are considered.⁶⁷

In addition to the components of expression, the Supreme Court has recognised that freedom of expression can involve two actors, both of whom are deserving of protection: those who create expression, and those who receive it. Section 2(b) protects listeners as well as speakers, readers as well as writers.⁶⁸

Although freedom of expression had been considered in both *Dolphin Delivery*,⁶⁹ and *Ford v. Quebec*,⁷⁰ it was not until *Irwin Toy* that a framework for analysing section 2(b) claims was developed.⁷¹ The government of Quebec had banned certain forms of advertising, at certain times of day, in order to protect children. *Irwin Toy* advertised in a prohibited manner, and was charged. The corporation defended the case, claiming the legislation violated the corporation's section 2(b) rights. The government responded by arguing that commercial speech did not fall within the scope of section 2(b), that if it did, section 2(b) was not violated, and if it was, the legislation was saved under section 1.

Under the framework developed to address the issues raised in *Irwin Toy*, the first step is to ask whether the activity at issue falls within the scope of freedom of expression. This will occur if the activity is expressive. "Activity is expressive if it attempts to convey a meaning. That meaning is its content."⁷² Decisions since *Irwin Toy* have confirmed that no matter how repugnant, "all content of expression" falls within the scope of section 2(b),⁷³ even hate speech,⁷⁴ obscene materials,⁷⁵ solicitation for the purpose of prostitution,⁷⁶ possession of child pornography,⁷⁷ and commercial speech.⁷⁸

We cannot ... exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content, and *prima facie* falls within the scope of the guarantee.⁷⁹

Although all content is protected, an expressive activity may fall outside the scope of section 2(b) if it takes an impermissible form. So far, the Supreme Court has held that the only form of expression which will always fall outside the scope of section 2(b) is violence.⁸⁰ However, the meaning of "violence" encompasses only physical violence. Speech that is intended to encourage violence, such as hate speech, does not fall within this exception.⁸¹

If an activity falls within the scope of protection, section 2(b) will be infringed if either the purpose or effect of a state regulation or action is to limit freedom of expression.⁸² Where the state's purpose is to limit expression by selecting between acceptable and unacceptable content, section 2(b) will be automatically violated, and the Charter analysis must proceed to section 1. This means that every content-based restriction necessarily has a purpose of limiting expression, which means every content-based restriction violates section 2(b).

If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's pur-

pose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control freedom of expression⁸³ [emphasis added].

Where the effect of the state regulation or action is to limit expression, section 2(b) will be infringed only where the expressive activity promotes one of the "principles and values underlying the freedom."⁸⁴ These principles are:

(1) Seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.⁸⁵

Virtually any expressive activity could be said to promote at least one of these principles. As such, under the *Irwin Toy* approach, the finding that an activity falls within the scope of section 2(b), combined with a finding that the activity has been limited by state action, will ordinarily lead to a conclusion that freedom of expression has been violated.

Once a violation is found, the analysis proceeds to section 1 of the Charter. As section 2(b) is so broad, most balancing between free expression and other state and societal interests occurs under section 1. In *R v. Keegstra*, for example, limitations on hate speech were found to violate section 2(b). It was under section 1 that the Supreme Court balanced the interests of those targeted by hate speech, the interest in free expression, and the interest of society that its members be free from the insidious and unwarranted attacks in hate speech.⁸⁶ Later cases confirmed that content-based restrictions always violated section 2(b), though such restrictions could be saved under section 1.⁸⁷ This approach means the balancing process under section 1 is vital to freedom of expression analysis. As so many factors may be considered, the section 1 analysis is highly contextual, varying with the issues raised by each case.

There has been some development of the analytical framework in the hate speech cases: *Keegstra* and *Zundel*. In *Keegstra*, it was argued that hate-speech should fall outside the scope of section 2(b) because the targets of hate-speech would, because of the speech, be afraid to express themselves. The Supreme Court held that it should consider the detrimental effects of hate speech under section 1, rather than at the scope stage of analysis.⁸⁸ In *Zundel*, the court rejected an argument that falsehoods should fall outside the scope of section 2(b), holding that even deliberate lies may have expressive value.⁸⁹ These cases suggest that the detrimental effects of a speaker's expression on a listener's free expression

rights should not be considered at the scope stage of analysis.

Since the *Irwin Toy* decision, and with the exception of *Keegstra* and *Zundel*, the section 2(b) analytical framework has not developed extensively in cases where the issue is a content-based restriction, such as the pornography and solicitation cases. This is because section 2(b) is so broad that the most significant analysis took place under section 1. I do not suggest by this that our understanding of section 2(b) has not developed in content-based cases. The cases involving child pornography, obscenity, and commercial speech⁹⁰ have clarified that the scope of section 2(b) is very broad, and they have highlighted the difficult issues raised by different types of speech. They have improved our understanding that some types of expression lie near the core of section 2(b)'s values, and others lie far from it.⁹¹ What I am suggesting is that the basic framework of analysis, which involves a consideration of section 2(b)'s scope and violation, has not significantly been altered by the content-based cases.

The Supreme Court was forced to develop the *Irwin Toy* analytical framework when it dealt with limitations on expression that were not based on content. This development occurred in the public forum cases: *Committee for the Commonwealth of Canada*,⁹² and *Ramsden v. Peterborough City*.⁹³ In *Commonwealth*, the Supreme Court held that public political expression in airports was constitutionally protected.⁹⁴ In *Ramsden*, the court held that posterage on public telephone poles was also protected.⁹⁵ In both cases, the state prevented expression not on the grounds that the particular speech at issue was harmful, but on the basis that those expressing themselves could not do so in a particular public location (public forum). While the issue was limited to protection of forum, these decisions are the only ones that have engaged in an in-depth analysis of limitations that are not based on content. The framework that has developed under the forum cases should be considered when dealing with other non-content-based limitations. As we will see later, anonymity should be regarded as a non-content aspect of expression, so we will consider the forum case law here.

The decision in *Commonwealth*, while unanimous in the result, contained six separate opinions from a panel of seven judges. These opinions contain three distinct approaches: those of Lamer C.J., McLachlin J. (as she then was), and L'Heureux-Dubé J. Although none of the approaches received the signatures of a majority of judges, the reasons of Lamer C.J. and McLachlin J. disclose agreement on one point: some public forums can be excluded from the scope of section 2(b). Together, their judgments were supported by a majority of the court, so this point is a binding precedent. This represents a move away from the traditional *Irwin Toy* approach, under which all expressive activities fall within the scope of section 2(b). Under Lamer C.J.'s approach,

which was supported by two other judges, an expressive activity in a public forum will fall within the scope of section 2(b) when the activity is consistent with the public forum's function. As an example, Lamer C.J. suggests that picketing by blocking a major highway would not fall within the scope of protection because picketing in that place conflicts with the forum's purpose, which is to allow for traffic flow. McLachlin J., who was also supported by two other judges, held that "a threshold test is required to screen out cases falling outside the free speech guarantee before reaching the section 1 analysis."⁹⁶ Under her approach, the use of a particular forum for expressive activity will fall within the scope of section 2(b) in two circumstances: (1) when the government restriction on forum-use is aimed at the content of expression; (2) if the expression at issue promotes one of the purposes underlying the freedom of expression guarantee.⁹⁷ We know from the cases involving content-based restrictions on expression that if a public forum is not involved, an expressive activity automatically falls within the scope of section 2(b) merely because it is expressive. This means that, in Justice McLachlin's view, the scope of section 2(b) can be limited by reducing the forums available for expression.

L'Heureux-Dubé J.'s approach would have the use of any public forum for any expressive activity fall within the scope of section 2(b), even a public demonstration in the Supreme Court Chambers. L'Heureux-Dubé J. resists any narrowing of section 2(b), and she would balance the Charter claimant's interests with state interests entirely under section 1. To this extent, she is in dissent.

In *Peterborough City v. Ramsden*,⁹⁸ the Court refused to choose between the three *Commonwealth* approaches. Despite this, *Ramsden* developed the analytical framework by clarifying that there is a two-step approach to determining whether a non-content aspect of an expressive activity falls within the scope of section 2(b):

Under *Irwin Toy*, *supra*, there are two basic steps in the s. 2(b) analysis. First, one must determine whether the activity at issue falls within the scope of s. 2(b). **This first step is itself a two-part inquiry. Does posterage constitute expression? If so, is posterage on public property protected by s. 2(b)?** Under the second step of the s. 2(b) analysis, one must determine whether the purpose or effect of the by-law is to restrict freedom of expression⁹⁹ [emphasis added].

Cases considering free expression since *Ramsden* have not developed the section 2(b) analytical framework. In *R v. Guignard*,¹⁰⁰ the Supreme Court was again faced with a claim that a particular forum was protected, but the Court did not address the jurisprudential dispute within *Commonwealth*. We can see, then, that the analytical framework under section 2(b) is unclear with respect to the scope of section 2(b), because of the three different *Commonwealth* approaches.

One last comment should be made. The Supreme Court of Canada has established a principle of content-

neutrality in its free-expression analysis. The Court had held, time and time again, that it is undesirable to place content-based limits on expression. Free expression is “little less vital to man’s mind and spirit than breathing is to his physical existence”.¹⁰¹ In a

free, pluralistic and democratic society we prize a diversity of ideals and opinions for their inherent value to both the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court the matrix, the indispensable condition of nearly every other form of freedom¹⁰² [internal quotes removed].

As John Stuart Mill has stated, it

is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.¹⁰³

For these reasons, the courts wish to avoid basing constitutional protection on a judge’s perception of an expressive activity’s value. The *Irwin Toy* approach is completely content-neutral at the scope stage, and completely content-neutral at the violation stage when the limitation on expression is purposeful. All content of expression, no matter how repugnant, falls within the scope of section 2(b), and every content-based limitation on expression violates section 2(b).¹⁰⁴ This does not mean that the value of expression is irrelevant to whether the expression should be protected. Value has always been relevant under section 1, where the interests in expression are balanced with other state and societal interests. Content-neutrality is most important at the scope stage, and least important under section 1, because the burden under section 2(b) lies on the individual, whereas under section 1, the burden lies on the state.¹⁰⁵ It could be argued that considering value at the violation stage is no more dangerous than at the scope stage, because the burden still lies on the individual. The difficulty with this argument is that value is only relevant if the violation is effects-based. As such, an individual may never need to prove that the expression promotes one of the section 2(b) values. For these reasons, it can be said that the Supreme Court has established a principle of content-neutrality, and this principle is most important at the scope stage of section 2(b) analysis.

The components of expression and framework of analysis allow us to identify a basic model of expression. The model’s participants are listeners and speakers, and expression is made up of the following components: form, content, time, medium, forum and language. There is no reason to believe that this list is exhaustive. These components must be analysed as if they belonged to one of two groups: “content” or “non-content.” The content group contains those aspects of expression that are the message to be conveyed. The non-content group

contains those aspects of expression that are not the message to be conveyed; form, forum, time, medium, and language. This grouping is required because the *Irwin Toy* framework requires courts to analyse content based limitations differently from non-content based limitations. All content automatically falls within the scope of section 2(b), regardless of its value, and content-based limitations always violate section 2(b) of the Charter. We see this from the treatment, referred to earlier, of obscene materials, hate-speech, child-pornography and solicitation. Non-content aspects of expression do not automatically fall within the scope of section 2(b), as we see from the violence exception and the public-forum cases. The original model, in which expression was regarded as being made up of form and content, is no longer accurate, so jurists should avoid thinking of expression in these terms.

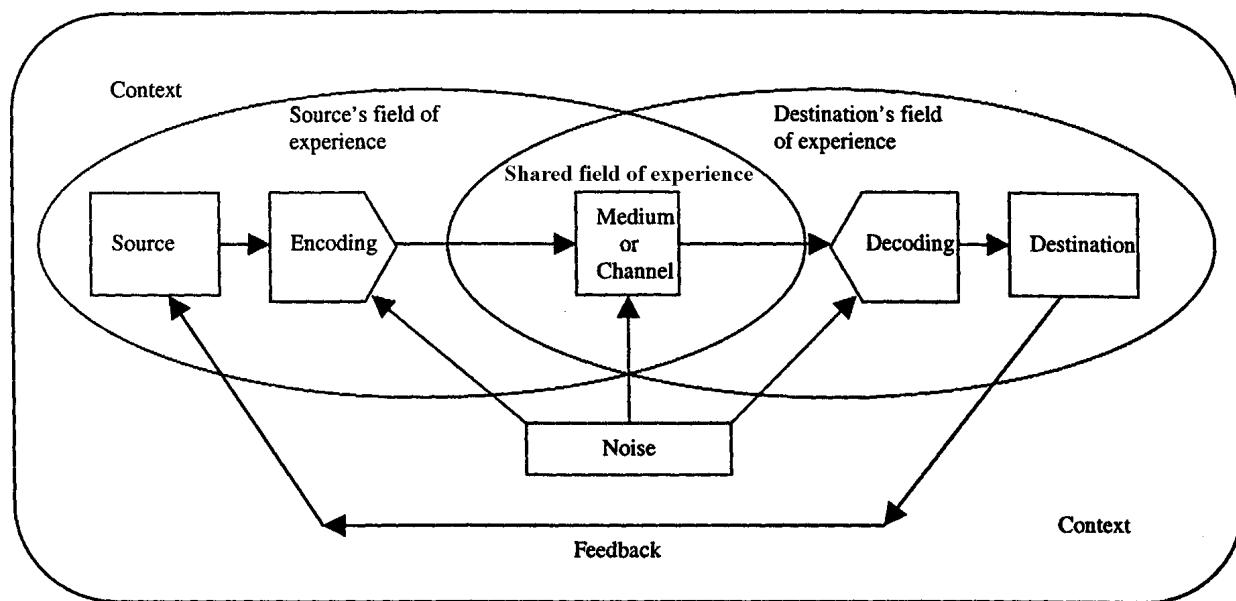
The question we are considering is how the courts should analyse anonymity at the scope and violation stages of the section 2(b) analysis. The model of expression currently in existence poses several problems. Anonymity can be so closely linked to the message to be conveyed that it becomes part of that message, but it can also be tenuously linked to an expressive activity. If we conduct a traditional *Irwin Toy* analysis, it seems that we have to categorise it. But as what? Content? Non-content? Both? Neither? We also know that in some circumstances, anonymity may actually discourage expression. Yet the hate-speech cases suggest that even if an expressive activity does discourage expression, it still falls within the scope of section 2(b). Does this mean that anonymity will always be protected, even when it undermines free expression? Should the public forum approach, which excludes some forums from the scope of section 2(b), be extended to include anonymity? But how would this work?

A Model Provided By Communication Theory

Before deciding how to analyse anonymity, we should first evaluate the strengths and weaknesses within the Supreme Court’s model. We will then be in a position to try and determine how the case law should be developed to accommodate anonymity. In conducting this analysis, it will be useful to compare the Supreme Court’s model of expression with another model — that provided by communications theory.

Several models of communication have been developed by communication theorists, though most share some basic characteristics. One diagrammatic model, which is frequently used to describe the communication process, is reproduced as figure 1, below.¹⁰⁶

Figure 1: A Basic Model of Communication



This basic model describes communication as a symbolic process, in which a source (the person wishing to communicate), produces a message to be communicated, with the intent of producing some effect on the destination. The message is “encoded”, which means it is converted into symbols, which are a form suitable for transmission. The message is then transmitted through the channel (or medium) of communication. After transmission, the message is received by the destination, which is the person for whom the communication is intended. Reception is not enough for communication to occur,¹⁰⁷ and should not be equated with understanding. The destination must decode the message before it can be understood. For successful communication, the message must be decoded in such a way that the message means the same thing that it did before it was encoded. This means that both the source and the destination must share the same understanding of the symbols. I will illustrate this process using a simple dinner conversation as an example, before explaining the model further.

The information source is a dinner guest who wants her host (the destination), to pass the salt. The guest's brain produces the message, but the thoughts produced by the brain cannot be understood or even recognised by the host. The dinner guest's brain encodes the message by ordering the guest's mouth and voice box to produce the sound pattern; “Would you please pass the salt.” The sounds “Would you please pass the salt”, are symbols representing the actor (“you”, which refers to the host), the action (passing), and the subject of the action (salt). The words also contain symbols that identify the communication as a polite request (Would you please), rather than an order. The channel of communication is air molecules, which transmit sound through vibration. When the guest's voice box produces the words, they are transmitted through the air as sound

waves. Reception occurs when the sound enters the host's ears, causing the eardrum to vibrate. The message is then decoded by the host's brain, which interprets the electrical impulses produced by the vibration of the eardrums. Only then has communication occurred. The communication will only be successful if both the source and receiver share an understanding of the symbols involved. Both must be able to hear sounds, and both must recognise that the sound “salt” represents the salt shaker on the table.

As the model indicates, communication involves more than merely the preparation, encoding, transmission and decoding of a message. Communication occurs in a context; will not be successful unless both the source and destination share fields of experience; involves feedback; and can be distorted by noise.

Communication is said to occur within a context because the same symbols can mean different things in different circumstances. The words “I had a rough day today” have completely different meanings to an office worker who speaks to a colleague at the bar, and to a soldier who is reporting to a superior officer about a battle involving many casualties. Context may be required before the message can be properly understood.

Communication cannot occur unless the source and destination share fields of experience.¹⁰⁸ At its most basic level, this means that the source and destination must assign the same meaning to the same symbols. Both parties must speak the same language to be able to communicate. There are many fields of experience, however, and fields of experience may overlap imperfectly. While this paper is written in English, this does not mean that every person who can read English will be capable of comprehending this article. The article assumes that the reader has a basic understanding of Canadian constitutional law, and knows that laws that

conflict with the *Canadian Charter of Rights and Freedoms* may be of no force and effect. If a reader's field of experience does not include this knowledge, this article may be misunderstood.

Feedback is transmitted from the destination to the source, and tells the source whether the message is being decoded and interpreted as the source intended it to be. We receive feedback both from our destination, and from our messages.¹⁰⁹ As an example, if the dinner guest was tired, and said "sugar", rather than salt, he or she might hear this and correct the message. In our simple example, feedback might occur by the host passing the salt, which would indicate that the message had been understood. If the host responded by passing the sugar, this feedback would indicate that the message had been misunderstood. Feedback means that in most, if not all communication, parties are sender-receivers,¹¹⁰ with both parties simultaneously sending and receiving messages. When a person speaks to another, the speaker evaluates his or her words through the reactions of the listener. Even where the sender is not present, we perceive our own messages, and may alter the content based on our perceptions. As I edited this paper, I spotted the occasional spelling mistake, and corrected it accordingly. As communication is a transactional process, not merely a discrete act on the sender's part, both sender and receiver influence the content of communication. Communication theory predicts what our analysis of anonymity has revealed — that both speakers and listeners have an impact upon the meaning of expression.

The model of communication theory recognises that communication is distorted by "noise." The concept of noise was first introduced by Claude E. Shannon and Warren Weaver in *The Mathematical Theory of Communication*.¹¹¹ "Noise," which is also described as "interference" by some communication theorists, refers to anything that interferes with the communication process. Noise can affect any stage of the communication process, including encoding, transmission or decoding. The simplest example of noise is physical noise that interferes with the transmission of a message, such as static on the telephone. Noise is not limited to physical noise, however. In a courtroom, noise might be the sight of a prosecutor walking around with his or her fly undone. A juror might be so distracted by this that the juror doesn't hear anything the lawyer says.

Noise also refers to interference with encoding or decoding, which may occur when the source and destination do not share fields of experience.¹¹² If a person writes "insert the USB cable into the USB port," noise occurs when the destination has no idea what a USB cable or port is. Encoding and decoding can also be distorted by the noise of biases, perceptions and stereotypes. As an example of how perception can affect communication, in some Canadian First Nations cultures, it is a sign of respect for an inferior (in age, education, or experience) not to look a superior in the eye while communicating. An inferior should keep making eye contact, as this demonstrates that the inferior is listening to what the superior is saying, but eye contact should be brief, and should be quickly broken off, only to be re-established

later. However, in Anglo-Canadian culture, such behaviour is perceived to be a sign that someone is lying. Anglo-Canadians are more likely to believe someone who speaks confidently while looking them in the eye. As a result, it has been suggested that members of the First Nations are at an inherent disadvantage when being tried by Anglo-Canadian judges and jurors. Demeanor that was intended by a First Nations witness to be a respectful attitude towards the lawyers and judge during questioning is likely to be interpreted by the Anglo-Canadian judge or juror as a sign that the witness is unable to speak the truth.¹¹³

Meaning is more than a dictionary definition, and the meaning ascribed to a message by the information source is not necessarily the same as the message understood by the receiver. Different destinations may understand the same message differently, because of how they perceive and decode the symbols. As an example, the meaning of a work of literature may differ depending on who is reading it. George Orwell's *Animal Farm* might be interpreted by a ten-year old as a rather bizarre story about a farm. Most adults are capable of recognising that the book is an anti-communist allegory. This means that, to some extent, meaning exists within the participants to communication.¹¹⁴ Richard Moon has recognised this in analysing freedom of expression, pointing out that the "activities of speaking and listening are interdependent; they are part of a process and a relationship. The interests of the speaker and listener are realized in the joint activity of creating meaning."¹¹⁵

Something that I have not included in the model being discussed here, but which is included in many models provided by communication theorists, is that communication has, and is intended to have, some effect on the destination of the message.¹¹⁶ When you issue an order to a dog, for example, telling it to "sit", the communication hopefully has the effect of making the dog sit down.

From the above discussion, we can see why communication is thought of by communications theorists as a *process*, rather than a singular, discrete event in time.¹¹⁷ Although the model separates sources from destinations, encoding from decoding, the model recognises that each of these components of communication are linked. "Objects which we separate may not always be separable, and they never operate independently — each affects and interacts with the others."¹¹⁸

Now that we have examined an alternative model of expression, we should compare this with the Supreme Court's model of expression, and criticise that model.

Criticising the Supreme Court's Model of Expression

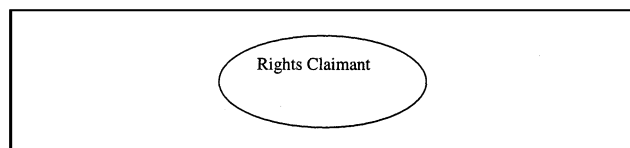
The similarities between the Supreme Court's model of expression and the model provided by communication theory can be summarised as follows. The foundation of expression and communication is generally the same: conveying a message. In the model of expression, the message is contained in some "form," and is con-

veyed through a medium. In communications theory, the “form” is the process of encoding the message into symbols, and the message is also conveyed through a medium (or channel). The model of expression recognises that both speaking and listening are components of free expression, while communication theory suggests that communication is a transactional process, involving both sources and receivers. To this extent, the models are largely the same, simply using different terminology. One difference, however, is that the model of expression includes expression that is not intended to be communicated.¹¹⁹

The reason why the model of expression resembles a model of communication is explained by the rationales underlying section 2(b). In *R v. Keegstra*,¹²⁰ McLachlin J. (as she then was) identified three generally accepted justifications for free expression. The first was the political process rationale: that free expression is “instrumental in promoting the free flow of ideas essential to political democracy and the functioning of democratic institutions.”¹²¹ The second was that freedom of expression is “an essential precondition of the search for truth. ... Freedom of expression is seen as a means of promoting a ‘marketplace of ideas,’ in which competing ideas vie for supremacy to the end of attaining the truth.”¹²² The third rationale was that “free expression is an end in itself ... All persons have the right to form their own beliefs and opinions, and to express them [for] expression is an integral part of the development of ideas, of mental exploration and of the affirmation of the self” [internal quotes omitted].¹²³ The model of expression resembles the model of communication because the first two rationales can generally only be realised if communication occurs.

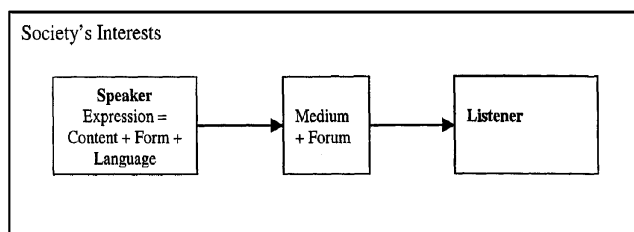
The key differences between the models are that the Supreme Court’s model regards expression as a discrete event, whereas communication theory sees communication as a process. The court does not recognise the links between listeners and speakers at the section 2(b) stage of analysis.¹²⁴ Nor does the model consider the links between actors and components, and the relationship between components at this stage. The Supreme Court focuses only on one aspect of expression, the interests of the rights-claimant, to the exclusion of all others. As an example, in cases involving freedom of the press to report on court cases, the court focuses solely on the interests of the rights claimant (the media), at the section 2(b) stage of analysis. The privacy rights of witnesses are only considered during the section 1 stage of analysis. The same is true in all cases involving content-based limitations on expression.¹²⁵ As a result, the model looks like this at the section 2(b) stage:

Figure 2: A Diagram of the Supreme Court’s Model of Expression at the Section 2(b) Stage of Analysis



As we can see, this hardly deserves to be called a model at all. It is only during section 1 that the Court considers all aspects of expression, taking into account the interests of both speakers and listeners. Only then does the model of expression come close to resembling the model of communication, and it could be presented in diagrammatic form as follows:

Figure 3: Diagram of the Supreme Court’s Model of Expression at the Section 1 Stage



We can see that the model at the section 1 stage seems to be an impoverished version of the model provided by communication theory. If the communication theory model were applied at the section 2(b) stage, this would require a different approach to the questions of scope and violation. Communication theory views communication as a process, which means that you need to look at the relationships between speaker and listener, and the processes of encoding and decoding, to determine what happens during communication. We cannot analyse communication merely by focusing on one aspect, such as the listener. Hence, if this model was used, we would have to consider all the aspects of expression, and the impact on the listener, before determining whether the expression in issue fell within the scope of section 2(b), and whether section 2(b) was violated. Does

this difference suggest that the Supreme Court's model of expression is flawed? I believe that it does.

The first problem is that a failure to consider the relationship between speakers and listeners at the section 2(b) stage opens the way to ruling that an expressive activity falls within the scope of section 2(b) even when the net effect of that activity is to undermine expression. Richard Moon argues that free expression is really intended to protect communication, and that communication is a process, with meaning being created by both speakers and listeners. He states that some forms of expression, such as deceit, intimidation, or manipulation involve "a significant abuse of the communicative relationship." He points out that such harm tends to be analysed under section 1, despite the fact that it seriously undermines the relationship of communication.¹²⁶ I do not want to debate whether freedom of expression is intended to protect communication. However, I do want to expand upon Moon's point that one person's expression can harm another person: Not only can one person's expression harm another (a racial insult, for example), one person's expressive activity can harm another person's expressive activity. To demonstrate this, the next paragraph summarises a real life example described by Julian Dibbell in his article "A Rape in Cyberspace."¹²⁷

On the Internet, some people interact through online environments called MUDs (multi-user dimensions). A MUD is essentially an online world with many different parts, each of which is called a room. Internet users can create a character whom they maneuver through this environment by moving between rooms. Users type a message into the computer, which can be read by all users who are in the same room. This is a form of pseudonymous interaction. Individuals may do this for fun, or to meet people without having to deal with the pressures and unconscious stereotypes raised in a face-to-face meeting. In one of these MUDs, a user controlled a character named "Mr. Bungle" (I will refer to the user as Bungle, and will assume that he was male). Bungle sexually abused other characters against their users' wills. He did this by using a computer program which gave him the ability to write messages and attribute them to another character. For example, Bungle might write "Go away", and it would appear on a computer screen under the name of another character. The attacks (that is, the messages that Bungle wrote), were particularly unpleasant. In one, Bungle forced a female character to "[jab] a steak knife up her ass, causing immense joy." While you might say "so what, it's only a game, and these are only words," these online events had a real-world impact. One of the victims of this attack later wrote some fairly vituperative comments about Bungle, and while writing this, "post-traumatic tears were streaming down her face". The other users eventually removed Bungle from the environment.¹²⁸ If you feel that maybe the victim in this case was overreacting, you should remember that words can have a physical impact. Think about how a member of an ethnic minority might react to racial remarks. Imagine how you would feel if you were a victim of a real-life sexual assault, who

interacted in this online environment because you could not face leaving your apartment.

In this example, Bungle's acts constituted a form of non-violent expression, but they completely undermined the victims' expressive activities. By taking over the characters controlled by other users, Bungle eliminated those users' abilities to express themselves. If the MUD had been operated by a governmental body, the decision to remove Bungle from the game would have engaged the Charter. You may think that such a scenario is far fetched, but in fact, governments have created online environments that allow users to interact, and contain mechanisms to expel undesirable users.¹²⁹ The current approach to section 2(b) of the Charter suggests that the only person's interests that could be considered under section 2(b) would be those of the rights-claimant (in this example, Bungle). But this approach would result in Bungle's activities falling within the scope of section 2(b), even though his activities undermined the freedom of expression interests of his victims. If Bungle only used the MUD rarely, but his victims used it frequently, and they all stopped using the MUD because of the attacks, the net effect of Bungle's activity would be to reduce expressive activity. Despite this, the current approach taken by the Supreme Court would require that Bungle's expression fall within the scope of section 2(b), because it fails to take into account the interests of both listeners and speakers at the scope stage of analysis.

By focusing only on the interests of the rights-claimant at the section 2(b) stage, the court ignores the effect of noise on the production of expression. In communication theory, understanding noise, and how to reduce noise, is essential to understanding how to successfully communicate. The court has recognised that noise exists, in recognising that hate-propaganda can influence the views of society's members.¹³⁰ Hate-speech creates biases, and in communication theory, biases are a form of noise. Despite this, the effect of noise is only considered relevant during a section 1 analysis, because this is the only stage at which the biases created by hate speech can be considered.¹³¹ While this may be justifiable in the context of hate-speech, it may not be appropriate in other contexts.

The nature, costs, and benefits of anonymity demonstrate that anonymity impacts expression in a number of different ways. The double-edged nature of anonymity means that anonymity can either harm or help expression. If the courts follow *Keegstra*, and only consider the detrimental aspects of anonymity under section 1 of the Charter, this could lead to a situation where anonymity undermines expression, but must still be protected under section 2(b). This suggests that the adverse aspects of anonymity should be considered at the section 2(b) stage, to determine whether it has an adverse effect on free expression, and how serious this adverse effect is. If anonymity merely influences, but does not significantly harm the expressive activity, we might not be too concerned, but if the noise caused by anonymity is so severe that it makes it impossible to engage in an expressive activity, it would be foolish to

allow that aspect of anonymity to fall within the scope of section 2(b). As an example of how this might occur, some expression is statutorily barred from being anonymous. Ontario legislation requires that testamentary instruments be witnessed by two people, and that the witnesses subscribe to the will.¹³² This is done for two reasons. First, so that at probate, the court can be sure that the testator was not coerced into signing the will, and that the person signing the will was the testator. Second, so that the parties involved can contact those witnesses in the event of concern regarding issues such as testamentary capacity. This legislation prevents wills from being made anonymously, or from being witnessed anonymously, but it would be absurd to suggest that this limits expression. The identity of the testator must be known to give effect to the testator's act of expression in making the will. If you don't know the testator's identity, the will is useless. Knowing who the witnesses are is vital if the will is challenged. If either the testator or witnesses were allowed to be anonymous, this would create noise by preventing listeners (those reading the will), from assessing the source, completely undermining the expression involved. Accordingly, noise, and the detrimental effects that anonymity has on expression, must be considered at the scope stage of section 2(b) analysis. This does not mean that all detrimental effects of anonymity should be considered at the scope stage of analysis. For example, where a witness is anonymous, this may adversely impact an accused person's fair trial rights. The detrimental effect here is relevant not to expression, but to another Charter right, so there is no reason to consider this at the s. 2(b) stage. It could better be considered under section 1.

Although most case law suggests that noise and the relationship between speaker and listener should be ignored at the section 2(b) stage, this limitation is not absolute. Violence has been excluded from the scope of section 2(b). At first glance, this exclusion seems to lack a theoretical foundation, and cannot be reconciled with the refusal to exclude other socially harmful forms of expression.¹³³ However, the violence exception can be justified if the relationship between listeners and speakers is relevant to the scope of section 2(b). An act of violence may express the actor's feelings, but also represents a denial of the listener's interests.¹³⁴ If the relationship between the listener and speaker was never relevant at the section 2(b) stage of analysis, there is no theoretical justification for excluding violence.

The Supreme Court requires us to analyse content and non-content aspects of expression differently. Communication theory suggests this is flawed. Communication theory views communication as a process, in which all the components of communication interact to produce meaning. Sources cannot be separated from destinations or the other aspects of communication, such as encoding, decoding, medium and noise. However, this view is not always accurate. In some cases, the non-content aspects of expression have little or no impact on the message to be conveyed. As an example, time is a non-content aspect of expression, and is usually tenuously linked to meaning. Whether a play begins at

8:00 p.m. or 8:30 p.m. has no impact on the play's meaning. However, in some cases, as communication theory predicts, you cannot separate the content and non-content aspects of expression. When this occurs, it becomes unclear which method of analysis should be applied.¹³⁵ The strength of the link between the content and non-content aspects of expression varies from case to case, and ostensibly non-content aspects can actually be the message to be conveyed. As an example, time is a key aspect of the two minutes of silence which occurs at 11:00 a.m. on Remembrance Day (the same hour that the First World War ended). On Remembrance Day, time is content, as it is a key part of the message to be conveyed.

In summary, the model provided by communication theory suggests the Supreme Court's model suffers from the following flaws: It fails to consider the links between listeners and speakers at the section 2(b) stage of analysis, with the result that a rights-claimant's expressive activity will fall within the scope of section 2(b), even when this activity undermines the expressive interests of others; it requires noise to be considered under section 1, even if noise undermines expression; it requires us to divorce the content of expression from the components of expression, which is difficult when the components of expression are inextricably interlinked with the content; and it means the method of analysis is not clear when the content and components of expression are interlinked. Having considered these difficulties, we should now go on to consider whether the current framework can accommodate anonymity.

The Current Framework is Unable To Accommodate Anonymity

The Supreme Court has recognised different components of expression as they have arisen, and there is no reason why the model of expression should prevent anonymity from being similarly recognised.

If the traditional *Irwin Toy* analysis is applied, anonymity will be thought of as a non-content aspect of expression. Non-content aspects of expression (form, forum, time, medium and language), all share one characteristic: Ordinarily, they have no meaning unless attached to some message to be conveyed. The same can be said for anonymity, which cannot exist in the abstract. Anonymity can be tenuously linked to expression, and in many cases, will not be central to what the speaker wishes to say. Accordingly, we should examine anonymity as if it were a non-content aspect of expression.

The only case law that specifically examines how a non-content aspect of expression should be analysed are the public forum cases. We should look to this case law for guidance, and attempt to extract the basic principles that will likely be applied to anonymity. Can anonymity be accommodated by the two-step *Ramsden* approach, and the three *Commonwealth* approaches? I will argue that the *Ramsden* approach will have to be modified if it is to be applied to anonymity, and that none of the

Commonwealth approaches could be successfully adopted.

If the two-step *Ramsden* approach was applied to anonymity without alteration, it would read as follows: (1) Does the activity constitute expression? (2) If so, is the anonymous expressive activity protected by section 2(b)? The first question poses no difficulties. If anonymity is not linked to an expressive activity, expression is not involved, so anonymity could not be protected by section 2(b).¹³⁶ The difficulty lies in applying the second *Ramsden* question, which asks whether the activity as a whole should be protected under section 2(b), but does not separately consider the content and non-content aspects. This has the effect of conflating the issues of whether the content should be protected with whether the non-content aspect of expression should be protected. The question does not ask whether “anonymity” falls within the scope of section 2(b), but whether the “anonymous-expressive-activity” is protected. This ignores the strength of the link between anonymity and content. The strength of this link exists on a continuum. At the weak-link end of the continuum, anonymity is irrelevant to the content, is distinguishable from the expression, and has no impact on whether the expression occurs. Anonymity may even harm expression. At the strong-link end, anonymity may be so closely related to the content of a message that the anonymity becomes part of the content.¹³⁷ If anonymity harms expression, or is so weakly linked to the content that it has no impact on the expression, there is no reason why the anonymous aspect should fall within the scope of section 2(b). However, if the anonymous aspect has no impact on the expression, the answer to the second *Ramsden* question, as it is currently phrased, must always be that anonymity should be protected. This is because the underlying activity is expressive, so the “anonymous-expressive-activity” must also be expressive. But why should anonymity receive constitutional protection under section 2(b), if it has no impact upon whether expression occurs? I do not suggest by this that the underlying expression should not be protected, but there is no reason for the anonymous aspect to be protected in such a case. A failure to consider the strength of the link could give constitutional protection to anonymity when doing so is completely unnecessary.

The two-step *Ramsden* approach will also not work when anonymity and the underlying expression are so strongly linked that anonymity is part of the content. Where anonymity is content, the anonymous aspect is itself expressive. *Irwin Toy* holds that all expression, no matter how repulsive, falls within the scope of section 2(b), which means that a two-step approach would be unnecessary. All this suggests that the two-step *Ramsden* approach cannot be applied to anonymity without modification.

Anonymity cannot be accommodated under any of the *Commonwealth* approaches, as they all suffer from the same flaw. All the approaches, if applied to anonymity, fail to consider the strength and importance of the link between anonymity and content in the section 2(b) analysis. McLachlin J. and Lamer C.J.’s

approaches also have the effect of violating the principle of content-neutrality. Their decisions indicate that the scope of section 2(b) does not include all non-content aspects of expression. This means that the scope of section 2(b) can be limited by reference to the non-content aspect. The principle of content-neutrality requires the content of expression to be irrelevant at the scope stage. Thus, content-neutrality suggests that when dealing with anonymous expression, a limitation on the scope of section 2(b) should be based solely on the anonymous (non-content), aspect of the expression. Unfortunately, an ostensibly non-content limitation on anonymous expression will be a content-based limitation when the anonymous aspect of expression is so closely linked to the message that anonymity becomes part of the message.

Lamer C.J.’s approach is specific to forum and it is difficult to see how this approach could be applied to anonymity. His approach can be additionally criticised on the basis that it is only content-neutral when the forum and the content of expression are clearly separable. The use of a particular forum may be integral to an expressive activity. Imagine, for example, a play that is written and designed to be performed in a particular public place, such as by the Tomb of the Unknown Soldier in Ottawa. The playwright may have written the play using imagery that requires the presence of the war memorial for the imagery to be understood. In such a circumstance, the forum is integral to the expressive activity, and separating questions of forum and content is impossible. Lamer C.J.’s approach categorises certain forums as unavailable for free expression, which eliminates the need to consider on a case-by-case basis whether the forum is integrally linked to the expression. If this approach were applied to anonymity, this would violate the principle of content-neutrality whenever anonymity is content. For these reasons, Lamer C.J.’s approach could not and should not be adapted to accommodate anonymity.

McLachlin J.’s approach requires a consideration of the expression’s value at the scope stage of section 2(b), which expressly violates the principle of content-neutrality. This approach requires the court to make a value judgment about the expression, making a judge’s perception of the expression relevant to constitutional protection. This approach is entirely inconsistent with previous decisions that held that all expression, no matter how repugnant, should fall within the scope of section 2(b).¹³⁸ McLachlin J. feels that some forms of expression, such as a demonstration within the Supreme Court Chamber, would not fall within the scope of section 2(b). It is unclear how her test could be objectively applied to take such an activity out of the scope of s. 2(b).¹³⁹ Why would a demonstration in the Supreme Court chamber not promote one of the values underlying section 2(b), if a similar demonstration in an airport would? What this approach really does is replace an objective analysis of the activity under section 2(b) with a subjective opinion about whether a particular place is appropriate for free expression. If Justice McLachlin’s approach were applied to anonymity, the anonymous activity would only fall

within the scope of section 2(b) if it promoted one of the values underlying section 2(b). As anonymity can be content, this would directly violate the principle of content-neutrality. Her approach could also protect an anonymous aspect of expression when that aspect actually harmed the expressive activity. We have seen that the anonymous aspect of an expressive activity can undermine free expression. Where this occurs, the anonymous aspect of expression would still fall within the scope of section 2(b), provided the expression as a whole promoted a section 2(b) value. For these reasons, McLachlin J.'s approach should not be adopted to deal with anonymity.

L'Heureux-Dubé J.'s approach in *Commonwealth* upholds the principle of content-neutrality, but if it were applied without modification to anonymity, it could attack free expression. If her approach were used, an anonymous activity will always fall within the scope of section 2(b) provided the activity is expressive. Unfortunately, anonymity can undermine expressive activity, in which case protecting it under section 2(b) would harm free expression. Another difficulty with adopting L'Heureux-Dubé J.'s approach is that it was rejected by the majority of judges in *Commonwealth*.

In dealing with the scope stage of the analytical framework, the problems with each of the *Commonwealth* approaches suggest that none of them should be adopted for anonymity. None of the approaches are binding because none represents a majority opinion. Having said this, three principles emerge from the case law which, as they are supported by a majority of judges, are likely to be adopted in dealing with anonymity. The first principle is content-neutrality, which was adopted in *Irwin Toy*, and has only been deliberately attacked by McLachlin J. in *Commonwealth*. The second principle, found in *Ramsden*, is that a two-step approach should be used to determine whether a non-content aspect of expression falls within the scope of section 2(b). The first step focuses on whether the underlying activity is expressive, and the second step takes into account the non-content aspect. The third principle is that while section 2(b) protects all content of expression, no matter how repulsive, non-content aspects of expression can fall outside the scope of section 2(b). This principle can be extracted from the violence exception, and from the judgments of Lamer C.J. and McLachlin J. in *Commonwealth*. This means that future courts will be permitted to exclude anonymity from the scope of section 2(b) in some circumstances. In dealing with the violation of section 2(b), the general *Irwin Toy* approach has never been overruled or challenged, which means it will likely be followed in dealing with anonymity. Now that we have established the principles that apply in analysing a non-content aspect of expression, we are ready to consider how anonymity should be analysed under section 2(b).

An Analytical Framework For Anonymity

When analysing anonymity under section 2(b), there is no reason to depart from the general *Irwin Toy* framework, which is as follows: The first question is whether the activity in issue falls within the scope of section 2(b). The second question is whether section 2(b) is violated. The third question is whether a violation of section 2(b) can be saved under section 1.

It is at the scope stage of section 2(b) that the case law is least clear. The approach to scope should respect content-neutrality, though the scope can be narrowed to exclude some aspects of anonymity. The two-step *Ramsden* approach suggests that the first question must be: Is the underlying activity expressive? Anonymity only exists as an aspect of an underlying activity, but not all activities are expressive. A particular use of anonymity should not be protected by section 2(b) if it is related to a non-expressive activity.

The *Ramsden* two-step approach indicates that a non-content aspect of expression will not fall within the scope of section 2(b) merely because it is related to an expressive act. More is required. The nature, costs, and benefits of anonymity suggest that anonymity can undermine free expression. Where this occurs, it would be illogical to hold that anonymity falls within the scope of section 2(b). The decisions of Lamer C.J. and McLachlin J. in *Commonwealth* allow the exclusion of some aspects of anonymity from the scope of section 2(b). This can be done in a content-neutral fashion, which does not undermine free expression, by holding that anonymity will only fall within the scope of section 2(b) if it promotes, allows, or has some beneficial impact upon an expressive activity.

As an example of how this approach would apply, the Internet has been used by murderers to find their victims. Such individuals are able to evade the police, and potentially commit additional crimes, because of the difficulties involved in tracking someone through the Internet. Such individuals use anonymity to commit crimes. Let us assume the *Criminal Code* is amended, allowing the police to apply *ex parte* for a warrant requiring an Internet Service Provider (ISP) to disclose the identity of a user. Let us assume further that such a warrant can only be issued if: (1) The police are investigating a serious violent offence, and (2) the police can establish reasonable and probable grounds to believe the user committed the violent offence. Such a scheme limits anonymity, because it allows the police to break the cloak of anonymity by obtaining the warrant, and the anonymous activity involves expression. Despite this, the legislation actually protects Internet users and promotes free expression. Internet users are more likely to

express themselves freely if they know there are laws designed to protect them from violent Internet predators. As such, this particular aspect of anonymity (the right to anonymous Internet use by a person suspected on reasonable and probable grounds of having committed a serious violent offence), would be excluded from the scope of section 2(b), because it does not promote expression.

In the above example, you will note that in concluding that the anonymous activity does not promote free expression, I have considered both the interests of the listeners (Internet users in general), and the interests of the rights-claimant speaker (the person reasonably suspected of having committed the violent offence). This represents a departure from the traditional *Irwin Toy* analysis, as confirmed in *Keegstra*, in which the interests of society were not considered at the scope stage of section 2(b) analysis. I justify this departure on several grounds. First, the Supreme Court has not placed an absolute requirement that one consider only the interests of the rights claimant during section 2(b). This is demonstrated by the violence exception, which can only be justified theoretically if the interests of listeners can be taken into account, and by the approach taken by Lamer C.J. and McLachlin J., in *Commonwealth*, which implicitly considers interests other than those of the rights claimant. Thus, my suggested analysis has a basis in current case law. Second, the Supreme Court's model of expression is weak at the section 2(b) stage of analysis. As the communication theory model demonstrates, communication is a process, rather than a discrete event. Divorcing the speaker's interests from the listener's interests cannot be justified when one person's expressive activity undermines another person's expressive activity. Thirdly, anonymity is double-edged. Whether it helps or hinders expression can only be determined on a case-by-case basis. The nature of anonymity requires that we consider the impact on the free expression rights of both listeners and speakers.

So far, I have only considered the method of analysis that would be adopted when anonymity is not part of the content. When anonymity is content, a two-step approach will not work. The only way to respect the principle of content-neutrality is to hold that where anonymity is content, it will always fall within the scope of section 2(b). The sole exception to this would be if the impact of the anonymous-expressive activity on another's expressive activity is so severe that the net effect of the anonymous-expressive activity is to undermine expression. An example of how this might occur is provided by the situation discussed earlier involving Mr. Bungle. As such, the test at the scope stage should vary depending on how closely the anonymity is linked with expression.

This approach I suggest is summarised as follows. If the anonymity is content, anonymity automatically falls within the scope of section 2(b). If the anonymous aspect of an activity is not content, a two-step approach to scope could be adopted which asks: (1) Is the act expressive? and (2) Does the non-content aspect of expression promote or allow the expressive activity? This approach has

the advantage of being content-neutral. It modifies, but does not reject, the two-step *Ramsden* approach, and it follows the principle established in *Commonwealth* — that the scope of section 2(b) can be narrowed by excluding some non-content aspects of expression. Most importantly, it denies protection to anonymity when anonymity undermines expression. This approach, incidentally, could also be applied to the analysis of public fora and other non-content aspects of expression.

At the violation stage of the section 2(b) analysis, *Irwin Toy* is binding authority and has to be followed by future courts when dealing with anonymity. Having said this, assuming an aspect of anonymity promotes expression, this does not mean that a limitation on anonymity will automatically violate section 2(b). Before applying the *Irwin Toy* analysis, we must remember that anonymity exists in various degrees, and in various forms. Governments have a variety of tools to use in regulating anonymity, and do not have to choose between perfect anonymity and no anonymity. Some tools may limit anonymity to such an extent that the expressive activity is hindered. Other tools may have no perceptible effect on expressive activity.

Under the *Irwin Toy* analysis, if a limitation is purposefully intended to limit expression by distinguishing between acceptable and unacceptable messages, a section 2(b) violation will occur. If the limitation merely has the effect of limiting expression, the Charter claimant must demonstrate that the expression supports one of the values underlying freedom of expression to establish a section 2(b) violation. A ban on anonymous messages criticising the government would be a limitation on anonymity that is purposefully aimed at limiting the content of expression. Such a purposeful limitation would always violate section 2(b). However, legislation requiring ISPs to link legal identity and IP addresses on the public domain would be a content-neutral limitation on anonymity that would have an effect of limiting expression. In such a case, the Charter claimant would have to show that the content of expression supports one or more of the values underlying section 2(b) before a limitation is shown. The issues raised by anonymity do not challenge this part of the *Irwin Toy* framework.

Where a limitation is content-neutral, a violation of section 2(b) should not be assumed merely because a limitation on anonymity exists. This is because even if anonymity does promote the expressive activity, a limitation on anonymity will not necessarily discourage that activity. When dealing with content-neutral limitations, the burden lies on the Charter claimant to demonstrate a violation. This means a claimant would need to demonstrate that a limitation on anonymity also limits the expressive activity, in addition to demonstrating that the expressive activity promotes one of the section 2(b) values. As with the scope stage, the court will have to consider the link between anonymity and content before deciding whether a limitation on anonymity violates section 2(b). As an example, in regulating SLAPP suits, the government could choose to introduce legislation that makes it difficult for plaintiffs to force ISPs to disclose a user's legal identity. The regulation could allow

legal identity to be disclosed in certain circumstances, and as such, would limit anonymity. However, the test could be so strong that only the most blatant acts of libel and slander will result in disclosure. The strength of the test could actually encourage anonymous users to express themselves freely because they know that their identities are not likely to be disclosed. As such, the anonymity falls within the scope of section 2(b), because it promotes free expression, but the limitation on anonymity does not discourage free expression, and as such no section 2(b) violation occurs.

Conclusion

Anonymity may arise in any number of different expressive activities, and the effects of anonymity on expression will vary from case to case. Anonymity may help expression, hinder expression, or have no perceptible effect on expression. Historically, anonymity has been vital to freedom of expression, allowing the promulgation of new ideas when the world seeks to silence the speaker. As a result, anonymity can undoubtedly be protected under section 2(b) of the Charter, though this

does not mean that anonymity must be protected in every case.

The Supreme Court's model of expression ignores the fact that much of communication, and much of expression, is a transactional process that involves the integrated activity of actors (speakers and listeners), and the components of expression. This flaw creates a number of difficulties when analysing expression, particularly when one person's expressive activities will undermine another's. The nature of anonymity means that the Supreme Court's model must be developed. It is not possible to analyse anonymity without considering the impact of anonymity on the interests of both speakers and listeners. It should not be assumed that anonymity promotes expression, or that a limitation on anonymity harms expression. Anonymity should only fall within the scope of section 2(b) when (1) the activity is expressive, and (2) the anonymity promotes the expressive activity, or when the anonymous aspect is expressive in and of itself. A limitation on anonymity should only violate section 2(b) where the Charter claimant can demonstrate that the limitation on anonymity also limits the expressive activity.

Notes:

¹ *Harper v. Canada*, [2001] A.J. No. 808 (Q.B.).

² For a discussion of this situation, see Lyrissa Barnett Lidsky, "Silencing John Doe: Defamation and Disclosure in Cyberspace", (2000) 49 Duke L.J. 855 [Lidsky].

³ See *Irwin Toy v. Doe*, [2000] O.J. No. 3318. In the U.S., see *HealthSouth Corp v. John Doe*, "HealthSouth Files Libel Suit for Statements Made on Web", (Nov 1, 1998) Sunday Patriot-News, at B5, cited in Lidsky, *ibid.* at 866.

⁴ *Re Ferguson and Director of Child Welfare et al.*, (1983) 44 O.R. (2d) 78.

⁵ *B.A. v. Stubbs*, (1999) 44 O.R. (3d) 391; *P.Q. v. Bederman*, [1998] O.J. No. 4009.

⁶ *Ontario (Attorney General) v. Dieleman*, (1994) 20 O.R. (3d) 229.

⁷ See *R v. Weir*, [2001] A.B.C.A. No. 181.

⁸ Department of Justice, Industry Canada and Solicitor General Canada, *Lawful Access — Consultation Document*, August 25, 2002, Government of Canada, at 12. Online: Department of Justice Canada http://www.canada.justice.gc.ca/en/cons/la_al/law_access.pdf. The following article discusses this document: Oliver Moore, "On-line spying proposal decried", (September 3, 2002) *The Globe and Mail*, page A4.

⁹ *Lobbyists Registration Act*, R.S.C. 1985 c. 44 4th Supp.

¹⁰ *Ibid.* at section 14.

¹¹ *Personal Information Protection and Electronic Documents Act*, R.S.C. 2000, c. 5, s. 7.

¹² See *Random House Webster's College Dictionary* (New York: Random House, 1991). See also Helen Nissenbaum, "The Meaning of Anonymity in an Information Age", (1999) 15:2 *The Information Society* 141 at 141 [Nissenbaum].

¹³ Gary Marx, "What's in a Name? Some Reflections on the Sociology of Anonymity", (1999) 15:2 *The Information Society* 99 at 100 [Marx].

¹⁴ Nissenbaum, *supra* note 12 at 142.

¹⁵ Marx, *supra* note 13 at 101.

¹⁶ Rob Kling *et al.*, "Assessing Anonymous Communication on the Internet: Policy Deliberations", (1999) 15:2 *The Information Society* 79.

¹⁷ See *Irwin Toy v. Doe*, [2000] O.J. No. 3318 (Q.L.).

¹⁸ When an email is sent, it will contain information at the beginning and end which identifies the computer which sent it. Anonymous remailers work by removing this information, assigning a new name to it, and sending it on. For a discussion of anonymous remailer technology, see Charles Arthur, "Identity Crisis on the Internet" (March 11, 1995) *New Scientist*.

¹⁹ Jean Camp, "Web Security and Privacy: An American Perspective", (1999) 15:2 *The Information Society* 249.

²⁰ Lidsky, *supra* note 2 at 866.

²¹ Anne W. Branscombe, "Anonymity Autonomy and Accountability: Challenges to the First Amendment in Cyberspaces", (1995) 104:7 *Yale L.J.* 1639 [Branscombe].

²² Lidsky, *supra* note 2 at 866.

²³ An example of legislation that has the effect of protecting anonymity can be seen with California anti-SLAPP legislation: *California Code of Civil Procedure*, section 425.16.

²⁴ "[A]nonymous communication is relational as it involves at least two parties, sender(s) and receiver(s)." Also: "A person is not anonymous in any absolute sense. Anonymity and pseudonymity are features of specific relationships and communications." Rob Kling *et al.*, "Assessing Anonymous Communication on the Internet: Policy Deliberations", (1999) 15:2 *The Information Society* 79.

²⁵ *Edmonton Journal v. Alberta (AG)*, [1989] 2 S.C.R. 1326 at 1339.

²⁶ Jean Lohisse, *Anonymous Communication: Mass Media in the Modern World*. trans. Stephen Corrin. (London: Allen & Unwin, 1983) at 160.

²⁷ See *R v. Seaboyer*, [1991] 2 S.C.R. 577.

²⁸ See *R v. Mills*, [1999] 2 S.C.R. 668.

²⁹ *Ibid.*

³⁰ *Edmonton Journal v. Alberta (AG)*, [1989] 2 S.C.R. 1326 at 1339, quoting from *Ford v. Quebec (AG)*, [1989] 1 S.C.R. 927.

³¹ Individuals may be willing to testify anonymously, but not otherwise. See *R v. Moosemay*, [2001] A.J. No. 1164 (Prov. Ct. Crim. Div.); *Canadian Newspaper Co. Ltd. v. Isaac* (1988), 63 O.R. (2d) 698, [1988] O.J. No. 126 (H.C.).

³² Nissenbaum, *supra* note 12 at 141.

³³ Jonathan D. Wallace, "Preserving Anonymity on the Internet", (Nov. 2000) *USA Today Magazine*, 129:2666 at 50.

³⁴ *NAACP v. Alabama*, 357 U.S. 449 (1958).

³⁵ *Criminal Code* R.S.C. 1985 c. C-46, s. 318-9.

³⁶ Kathleen Mahone, "Hate Speech: Affirmation or Contradiction of Freedom of Expression." [1996] *University of Illinois Law Review* 789.

³⁷ Branscombe, *supra* note 21.

³⁸ Lidsky, *supra* note 2 at 893.

³⁹ Lidsky, *supra* note 2 at 896.

⁴⁰ Al Teich *et al.*, "Anonymous Communication Policies for the Internet: Results and Recommendations of the AAAS Conference", (1999) 15:2 *The Information Society* 71.

⁴¹ Ellen Spertus, "Social and Technical Means for Fighting On-Line Harassment", (Paper presented at the Virtue and Virtuality: Gender, Law, and Cyberspace Conference.) Online: Massachusetts Institute of Technology <http://www.ai.mit.edu/people/ellens/Gender/glc/>

- ⁴² Michael A. Froomkin, "Legal Issues in Anonymity and Pseudonymity" (1999), 15:2 *The Information Society* 113 at 115-116 [Froomkin].
- ⁴³ These were the pseudonyms of Charlotte, Emily and Anne Brontë, who published their works of literature in the mid-eighteenth century, under the names of men.
- ⁴⁴ Froomkin, *supra* note 42 at 114.
- ⁴⁵ Alan F. Westin, *Privacy and Freedom* (New York: Athenum, 1967) [Westin].
- ⁴⁶ D.M. Pederson, "Dimensions of Privacy", (1979) 48 *Perceptual and Motor Skills* 1291 at 1293. See also Westin, *ibid.* at 31.
- ⁴⁷ Branscombe, *supra* note 21 at 1664.
- ⁴⁸ See the discussion above in "Anonymity can both encourage and discourage expression".
- ⁴⁹ See *infra* notes 74-80.
- ⁵⁰ Those who wish to further canvass this issue should review Jonathan T. Feasby's detailed and well-reasoned argument on this issue: Jonathan T. Feasby, "Who was that masked man? Online defamation, freedom of expression, and the right to speak anonymously", (2001) 1 *Canadian Journal of Law and Technology* 1.
- ⁵¹ See the judgment of Wilson J., in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326.
- ⁵² This might happen when the parties know each other's email address, but not each other's legal identity. One person can send money to the other using an Internet payment service such as Paypal or Billpoint. The service then bills the sender's credit card, and pays the recipient directly. The recipient could then send the goods purchased to a P.O. Box. There is no need for the sender to know the recipient's true identity unless the technology requires it.
- ⁵³ *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at para. 28.
- ⁵⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 2(b).
- ⁵⁵ *Ford v. Quebec*, [1988] 2 S.C.R. 712 [Ford].
- ⁵⁶ *Ibid.* at 748.
- ⁵⁷ *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927 [Irwin Toy].
- ⁵⁸ *Ibid.* at 968.
- ⁵⁹ An activity "is expressive if it attempts to convey meaning. That meaning is its content". See *Irwin Toy*, *supra* note 57 at 968.
- ⁶⁰ *Irwin Toy*, *supra* note 57 at 969-970.
- ⁶¹ *Cox v. New Hampshire*, (1941) 312 U.S. 569 at 575-576, 85 Law Ed. (US 311-313) p. 1053-1054. Time was identified in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, as an aspect of expression, without discussion.
- ⁶² The telephone is a medium of communication: *Canada (Human Rights Commission) v. Taylor* [1990] 3 S.C.R. 892, [1990] S.C.J. No. 129.
- ⁶³ See *Taylor, ibid.*, *Ford*, *supra* note 55 at 750, and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [1990] S.C.J. No. 66 at para. 65.
- ⁶⁴ *Lawful Access*, *supra* note 8 at 7.
- ⁶⁵ See *infra* note 68.
- ⁶⁶ See Richard Moon, "Access to Private Property Under Freedom of Expression" (1998) *Ottawa L.R.* 339.
- ⁶⁷ I have assumed that there is a distinction between "medium" and "forum." An argument could doubtless be made that a forum is a medium, but as nothing turns on this for the purposes of this paper, I will not consider the issue further here. The jurisprudence dealing with forums will be considered in detail later in this essay. See *Commonwealth*, *supra* note 61, and *Peterborough (City) v. Ramsden*, [1993] 2 S.C.R. 1084.
- ⁶⁸ *Canadian Broadcasting Corporation v. New Brunswick (A.G.)*, [1996] 3 S.C.R. 480, *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326.
- ⁶⁹ *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [Dolphin Delivery].
- ⁷⁰ *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712.
- ⁷¹ *Irwin Toy Ltd.*, *supra* note 57.
- ⁷² *Irwin Toy*, *supra* note 57 at 968.
- ⁷³ *Irwin Toy*, *supra* note 57.
- ⁷⁴ *R v. Keegstra*, [1990] 3 S.C.R. 697.
- ⁷⁵ *R v. Butler*, [1992] 1 S.C.R. 452 [Butler].
- ⁷⁶ Reference re. ss. 193 & 195.1(1)(c) of the *Criminal Code of Canada*, [1990] 1 S.C.R. 1123 [Prostitution Reference].
- ⁷⁷ *R v. Sharpe*, [2001] 1 S.C.R. 45 [Sharpe].
- ⁷⁸ *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232.
- ⁷⁹ *Irwin Toy*, *supra* note 57 at 969.
- ⁸⁰ *Irwin Toy*, *supra* note 57 at para. 42. In *Dolphin Delivery*, it was suggested that property damage would also fall outside the scope of section 2(b). While the violence exception has been confirmed on a number of occasions, the alleged property damage exception has not been.
- ⁸¹ *Keegstra*, *supra* note 74, at para. 35.
- ⁸² *Irwin Toy*, *supra* note 57 at 972.
- ⁸³ *Irwin Toy*, *supra* note 57 at 974.
- ⁸⁴ *Irwin Toy*, *supra* note 57 at 976.
- ⁸⁵ *Irwin Toy*, *supra* note 57 at 976.
- ⁸⁶ *Keegstra*, *supra* note 74.
- ⁸⁷ See *Butler*, *supra* note 75; *Sharpe*, *supra* note 77; *Prostitution Reference*, *supra* note 76.
- ⁸⁸ *Keegstra*, *supra* note 74 at 731.
- ⁸⁹ *R v. Zundel*, [1992] 2 S.C.R. 731.
- ⁹⁰ See *supra* notes 74-80.
- ⁹¹ See *R v. Lucas*, [1998] 1 S.C.R. 439 at para. 34.
- ⁹² *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 [Commonwealth].
- ⁹³ *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.
- ⁹⁴ *Commonwealth*, *supra* note 92.
- ⁹⁵ *Ramsden*, *supra* note 94.
- ⁹⁶ *Commonwealth*, *supra* note 92 at 232.
- ⁹⁷ McLachlin J.'s view is difficult to understand, and seems to conflate the issues of scope and violation. McLachlin J.'s threshold test is based on whether the expression promotes one of the values underlying section 2(b). She argues that the
- test for the constitutional right to use government property for public expression should conform to the following criteria. It should be based on the values and interests at stake and not be confined to the characteristics of particular types of government property. The analysis under section 2(b) should focus on determining when, as a general proposition, the right to expression on government property arises. The task at this stage should be primarily definitional rather than one of balancing, and the test should be sufficiently generous to ensure that valid claims are not excluded for want of proof. Once it has been determined that the expression in question at the location in question falls within the scope of s. 2(b) thus defined, the further question arises of whether the government's limitation on the property's use for the expression in question is justified under s. 1. ...
- Irwin Toy* distinguished between two classes of restrictions on freedom of expression: restrictions aimed at preventing certain meanings being conveyed, and restrictions which are not directed at content but have the effect of restricting expression.
- ... [L]imitations on forum may fall into either of the two fundamental categories of restrictions on expression distinguished in *Irwin Toy*. ...
- ... The test for whether s. 2(b) applies to protect expression in a particular forum depends on the class into which the restriction at issue falls. If the government's purpose is to restrict the content of expression through limiting the forums in which it can be made, then this, as Cox says, is "usually impermissible". The result, under the *Canadian Charter of Rights and Freedoms*, is that s. 2(b) **applies**. If, on the other hand, the restriction is content neutral, it may well not infringe freedom of expression at all. In this case, the jurisprudence laid down in *Irwin Toy* requires that the claimant establish that the expression in question (including its time, place and manner) promote one of the purposes underlying the guarantee of free expression [emphasis added] (*Commonwealth*, *ibid.* note 92 at 236-238).
- McLachlin's approach to section 2(b) was unclear. In *Commonwealth*, she discusses whether section 2(b) "applies," but she does not clarify whether "applies" refers to the scope of section 2(b), or the violation of section 2(b). This has the effect of conflating the analysis of scope and violation. "Though the two will overlap in many cases, the concepts are separate." (See Jamie B. Cameron, "A Bumpy Landing: The Supreme Court of Canada and Access to Public Airports Under Section 2(b) of the Charter." (1992) 2 M.C.L.R. 91 at 104.). Her approach was clarified by Iacobucci J.'s judgment in *Ramsden*, which was presented on behalf of the entire court. In *Ramsden*, Iacobucci J. analyses the issues using all three *Commonwealth* approaches and reaches the same conclusion under each approach. He explicitly separates his analysis of scope (*Ramsden*, *supra* note 93 at 1096-1104), and violation (*Ramsden*, *supra* note 93 at 1104-1105), and applied McLachlin J.'s approach at the scope stage of the section 2(b) analysis. As McLachlin J. concurred in this judgment, this suggests she intends her approach to operate at the scope stage. This means that in her

opinion, the value of expression is relevant at the scope stage of section 2(b). "This ... is inconsistent with step one of *Irwin Toy's* test, which treats any attempt to convey meaning, trivial or not, as *prima facie* protected by section 2(b)" (Cameron at 103).

⁹⁸ Ramsden, *supra* note 93.

⁹⁹ Ramsden, *supra* note 93 at 1095-1096.

¹⁰⁰ *R v. Guignard*, [2002] S.C.C. 14.

¹⁰¹ *Switzman v. Elbling*, [1957] S.C.R. 285 at 306, cited in *Irwin Toy*, *supra* note 57 at 969.

¹⁰² *Irwin Toy*, *supra* note 57 at 968.

¹⁰³ John Stuart Mill, "On Liberty" in *On Liberty and Considerations on Representative Government* (Oxford: OUP, 1946) at 14, cited in *Dolphin Delivery*, *ibid.* note 69 at 583.

¹⁰⁴ *Irwin Toy*, *supra* note 72.

¹⁰⁵ See the judgment of L'Heureux-Dubé in *Commonwealth*, *ibid.* note 92 at 183, as well as Michael Kanter, "Balancing Rights Under Section 2(b) of the Charter: Case Comment on *Committee for the Commonwealth of Canada v. Canada*" (1992) 17 *Queens L.J.* 489 at 498.

¹⁰⁶ The discussion of communication theory which follows has been taken from a number of sources. In 1949, Claude E. Shannon and Warren Weaver developed a general model of communication in *The Mathematical Theory of Communication* (Chicago: University of Illinois Press, 1949). This model, which included an information-source, a transmitter, a receiver, an information-destination, and recognised the importance of noise, has been hugely influential. The Shannon and Weaver model has been adapted and built upon by a number of communication theorists. Joseph Schramm, in "How Communication Works" in *The Process and Effects of Mass Communication* (University of Illinois Press: Urbana, 1954), developed three models, which recognised the importance of fields of experience, encoding and decoding. The basic model I have described here is not my own, but is taken largely from the Shannon and Weaver and Schramm models. Those models are reproduced in many basic texts, which contain a more substantial discussion of the models of communication than I have engaged in. Examples of such texts, which indicate that the model I have used here is generally accepted as a basic model for how communication occurs, includes: Joseph A. Devito, *Essentials of Human Communication* (New York: Harper Collins, 1993); Ronald B. Adler and George Rodman, *Understanding Human Communication*, 4th ed., Orlando: Holt, Rinehart, Winston: 1991; Werner J. Severin and James W. Tankard, Jr. *Communication Theories: Origins, Methods and uses in the Mass Media*, 4th ed. (New York: Longman, 1997); Richard F. Hixson, "Mass Media: An approach to human communication" in Richard W. Budd and Brent D. Ruben, eds., *Approaches to Human Communication* (New York: Spartan Books, 1972) at 222-236; Colin Cherry, *On Human Communication: A review, a survey and a criticism*, 2nd ed. (Cambridge: The M.I.T. Press, 1966); Larry L. Barker, *Communication*, 4th ed. (Englewood Cliffs: Prentice-Hall, 1987); Brent D. Ruben, *Communication and Human Behavior*, 3rd ed. (Englewood Cliffs: Prentice Hall, 1992); Gerald Stone et al., *Clarifying Communication Theories* (Ames: Iowa State University Press, 1999 at 26-35); Stewart L. Tubbs and Sylvia Moss, *Human Communication*, 5th ed. (New York: Random House, 1987); Rudolph F. Verderber, *Communicate!*, 3rd ed. (Belmont: Wadsworth Publishing Company, 1981). Different models for communication have been suggested and used, depending on what the theorist wanted to demonstrate. In one model, it is suggested that communication does not necessarily begin with a person but with an event. A plane crash occurs, which causes a reporter to report (Severin, 1997, at 60, describing a model by Westley and MacLean). I do not propose to discuss all the models that have been suggested in communication theory, as I am interested only in a model that describes how communication actually occurs. For a complete review of other models of communication, the reader should refer to the above texts, and also to: H.D. Lasswell, "The structure and function of communication in society" in L. Bryson, ed., *The Communication of Ideas* (New York: Harper & Row, 1948).

¹⁰⁷ Colin Cherry, *ibid.* note 106 at 9.

¹⁰⁸ This concept was introduced by Wilbur Schramm, as "frames of reference", in "The Nature of Communication Between Humans", in Wilbur Schramm and Donald F. Roberts, *The Process and Effects of Mass Communication*, Rev. Ed., (Urbana: University of Illinois Press, 1977) at 31 (same as "How Communication Works").

¹⁰⁹ Wilbur Schramm, "How Communication Works" in Wilbur Schramm, *The Process and Effects of Mass Communication* (Urbana: University of Illinois Press, 1949), reproduced in C. David Mortensen, *Basic Readings in Communication Theory* (New York: Harper & Row, 1973) at 35 [Schramm].

¹¹⁰ Adler, *supra* note 106 at 16 and 18 and Devito, *supra* note 106 at 7.

¹¹¹ Claude E. Shannon and Warren Weaver, *The Mathematical Theory of Communication* (Chicago: University of Illinois Press, 1949). Shannon

and Weaver's theory has been hugely influential, and their model is the basis for many modern models of communication. See *supra* note 106.

¹¹² See Severin and Tankard (1997), *supra* note 106 at 74-78.

¹¹³ See Rupert Ross, *Dancing With a Ghost: Exploring Indian Reality*, Butterworths Canada, 1992, at page 3.

¹¹⁴ Schramm, *Nature of Communication Between Humans*, *ibid.* note 109 at 30.

¹¹⁵ Richard Moon, *The Constitutional Protection of Freedom of Expression*, (Toronto: University of Toronto Press, 2000) at 42 [Moon].

¹¹⁶ See Lasswell's model of communication, described in Severin & Tankard, *supra* note 106 at 47.

¹¹⁷ David K. Berlo, *The Process of Communication: An Introduction to Theory and Practice* (New York: Holt, Rinehart and Winston, 1960) at 23-38.

¹¹⁸ Berlo, *ibid.* at 117.

¹¹⁹ In *Sharpe*, the Supreme Court held that two categories of self-created works not intended for communication, which could otherwise fall within the ban on child pornography, were protected: *R v. Sharpe*, *supra* note 77 at para. 128.

¹²⁰ *R v. Keegstra*, [1990] 3 S.C.R. 697.

¹²¹ *Keegstra*, *ibid.* at 802.

¹²² *Keegstra*, *supra* note 119 at 803, citing Justice Oliver Wendell Holmes in *Abrams v. United States*, 250 U.S. 616 (1919).

¹²³ *Keegstra*, *supra* note 119 at 804, citing T.J. Emerson, "Toward a General Theory of the First Amendment", (1963) 72 *Yale L.J.* 877.

¹²⁴ Moon, *supra* note 115 at 41.

¹²⁵ *Canadian Broadcasting Corporation v. New Brunswick*, [1996] 3 S.C.R. 480. The Crown, because of the broad scope of section 2(b), routinely concedes that section 2(b) is violated, which eliminates the need to consider any interests beyond those of the rights claimant (see, for example, *R v. Sharpe*, [2001] 1 S.C.R. 45 at para. 18). That the Court will only consider the interests of the rights claimant is also confirmed by the hate-speech cases, where the court focusses solely on whether hate speech was expressive, and whether it had been limited (*Keegstra*, *supra* note 120 at 731). The other interests, such as the interests of society in ridding itself of hate speech, and the interests of minority groups in not being threatened by hate speech, were considered only during the section 1 analysis (*Keegstra*, *supra* note 120 at 747-748).

¹²⁶ Moon, *supra* note 115 at 41-42.

¹²⁷ Julian Dibbell, "A Rape in Cyberspace" *The Village Voice*, December 23, 1993, reproduced in Julian Dibbell, *My Tiny Life* (Owl Books, 1998), online: Julian Dibbell <http://www.juliandibbell.com/texts/bungle.html>.

¹²⁸ *Ibid.*

¹²⁹ The U.S. military has created a multiplayer game, designed to be played online, as a recruiting tool: "'Recon' version of *America's Army* launches July 4" (07/02/02), *The Dallas Morning News*, online: Dallas News http://www.dallasnews.com/cgi-bin/gold_print.cgi. The game contains allows users to vote to expel a user who is not following the rules of the game. The Government of Canada also seems to have operated a Web-conference (see Health Forum, online: http://healthforum.ic.gc.ca/e_faq.html, last visited February 18, 2003).

¹³⁰ *Keegstra*, *supra* note 120 at 747-748.

¹³¹ *Keegstra*, *supra* note 120 at 731.

¹³² *Succession Law Reform Act*, R.S.O. 1990 c. 26, s. 4.

¹³³ See Jamie Cameron, "The Original Conception of Section 1 and its Demise: A Comment on *Irwin Toy Ltd. v. Attorney General of Quebec*", (1989) 35 *McGill L.J.* 253 at 268. Thanks go also to Professor John H. Currie, whose comments led me to consider this issue.

¹³⁴ Moon, *supra* note 115 at 44-46.

¹³⁵ For a discussion of this problem in the context of violence, see Cameron, *supra* note 132 at 269, and M. David Lepofsky, "The Supreme Court's Approach to Freedom of Expression — *Irwin Toy v. Quebec (Attorney General)* — And the illusion of Section 2(b) Liberalism", (1993) 3 *National Journal of Constitutional Law* 37 at 48-52.

¹³⁶ I am assuming here that anonymity can never be expressive in and of itself. If it could be, it would fall to be dealt with as if it were content, which will be discussed later in this article.

¹³⁷ On this point, see also Moon, *ibid.* note 115, at page 45, where he argues that "meaning is inseparable from the form in which it is manifested. A restriction on a particular form of expression must be understood as a restriction on meaning, even if the purpose of the restriction is not to prevent the communication of a particular message".

¹³⁸ Cameron, "A Bumpy Landing", *ibid.* note 97 at 103.

¹³⁹ Richard Moon, "Out of Place: Comment on *Committee for the Commonwealth of Canada v. Canada*", (1993) 38 *McGill L.J.* 204 at 225.